

## HYBRID ARBITRATIONS: HOW TO AVOID PROCEDURAL PITFALLS

Hybrid arbitrations can save participants both time and money. Planning and communicating with the arbitration case administrator can help you avoid disruptions and allow you to concentrate on presenting your best case.

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The year 2020 saw an increase in the use of virtual arbitrations. To the surprise of many, participants have been satisfied with the procedural ease of these hearings. Now that in-person arbitration hearings are again an option, many attorneys and their clients want to combine some of the conveniences of virtual arbitrations with the familiar advantages of in-person arbitrations. These blended hearings are now commonly known as hybrid arbitrations. (In the past, the term “hybrid arbitration” referred to a hearing that combined a mediation with an arbitration.)

It’s easy to incorporate remote video appearances into in-person arbitrations. A single witness or many witnesses can participate remotely. Doing so can save participants time and money. However, this



(Photo Illustration: Jason Doiy/ALM)

arrangement may introduce some procedural pitfalls, which I will address in this article.

### Consider Which Rules Apply

To determine the rules that will apply to your arbitration, you should consult the

arbitration agreement. Many arbitration agreements state the controlling law. You should also determine the extent to which the Federal Arbitration Act might apply. Also, the law of one or more states may also apply to at least some extent.

Many arbitration agreements also specify which organization's rules and procedures will apply to the proceeding. Sometimes, but not always, the agreement will also state which organization will administer the arbitration. Be alert to the fact that sometimes an arbitration clause will specify that the rules of one organization govern but that another organization will administer the proceeding. For example, sometimes an agreement adopts the American Arbitration Association's Construction Industry Arbitration Rules but specifies that another organization will handle the administration of the case.

Unfortunately, there may be issues that arise during a hybrid arbitration that have not been addressed by any institution's rules.

### Potential Challenges

The fact that some parties are participating remotely while others are not may create some challenges. Therefore, it is important to identify and resolve them before the hearing.

One such detail to iron out ahead of time is how to configure the remote part of the hearing. If a witness is testifying remotely, it would be ideal if everyone else were in the same room, with the arbitrator determining who

can speak and when. However, an attorney might want to have a separate electronic room available to confer with the witness during a break. Also, if multiple participants are appearing remotely the in-person participants will need to have laptops or some other means (e.g. a large screen monitor if there are multiple participants in the same location) to view the remote participants. Luckily, this can be handled by the case management team. If you provide him or her with the number of remote and in-person participants in advance, he or she can arrange the remote proceeding for the proper number of participants and create specific breakout rooms.

Another thing to consider is which videoconferencing platform the remote participants will be using and who will be responsible for managing it. The arbitration offices may have rooms that are fully equipped for remote appearances or that can be supplemented with mobile carts that feature video conferencing technology. Be sure to check if these rooms can handle a Zoom connection or whichever videoconferencing platform will be used for the hearing. Once again, it is important to let the case administration staff know ahead of time what

you will need. Also, some attorneys bring their own equipment to the hearing room. If you plan to do so, you should let the case administration staff know that you will be doing so and discuss whether there is any issue with your equipment connecting at the place of the hearings.

### Witness-Related Issues

Having a witness appear remotely can raise other types of issues too. For example, if a witness is going to testify remotely from another jurisdiction, how can you compel that witness to appear? How will you know if the witness fails to appear and what law will determine the consequences of the failure to appear? If the witness does appear, who will administer the oath, and what law governs the form of the oath? To avoid disrupting your case at the hearing, try to identify any issues beforehand and plan how you want to resolve them.

The place of appearance can also be an issue. Who will define what that place will be? Are others allowed to be in the same room as the witness, and how will you know if someone else is present? Discussing these details with your client and the case administrator can help the hearing run more smoothly.

Finally, you should have plans in place for what will

happen if the remote connection is lost before the testimony is complete. Taking a short break to reestablish the connection is usually not be a problem, but a significant break might be, especially if the hearing is governed by rules that give each side only limited amounts of time for their presentation.

### Party-Related Issues

A remote appearance by one or more of the parties can present other potential issues. As discussed previously, all parties appearing remotely will have to use the same videoconferencing platform. If your client is the one appearing remotely, you should make sure that the client is familiar with whichever platform will be used for any other remote appearance in the hearing. For example, what happens if your client is familiar with Zoom, but a witness is going to appear by Microsoft Teams? You should also let your case administrator know how to reach your client if the connection is lost.

Other problems presented by remote client appearances involve possible failures to appear by the client. As is the case with a remote witness, a short loss of connection might

not be a problem. A longer loss can be. What will be the rules if your client's connection cannot be restored for a significant amount of time? If each side has only limited time, will the arbitrator be able to count against your client's case any dead time caused by your client's failure or inability to appear? You do not want to have to improvise on that point if a connection is lost in the last afternoon of a limited time hearing. This may also be a topic where all sides have a shared interest and discussing these issues with your opposing counsel could result in some positive solutions.

### Final Thoughts

Hybrid arbitrations, and hybrid court proceedings, are relatively new, and they often do not have defined sets of rules specific to their nature. However, the California Legislature is considering Senate Bill 241, which was sponsored by Sen. Tom Umberg (also an attorney with substantial complex litigation experience). That bill, if enacted, would establish many specific rules for remote hearings in civil cases in California courts. Those rules could then also be applied to private arbitrations. Other states may be considering similar legislation.

It would be helpful for any arbitrator to know that the procedures governing a virtual arbitration are supported by the law in that jurisdiction.

Hybrid arbitrations are here to stay no matter what rules are adopted for remote civil cases decided by the courts. Hybrid arbitrations can save participants both time and money. Planning and communicating with the arbitration case administrator can help you avoid disruptions and allow you to concentrate on presenting your best case.

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